No. (2)

Supreme Court, U.S.
FILED
991920 AUG 2 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

Dennis Balanay
Defendant - Appellant

Petitioner,

v.

State of Hawaii
Plaintiff - Appellee

Respondent.

On the petition for writ
of Certiorari to the court
whose judgement you seek to review
Hawaii's in the intermediate court of appeal
May 3, 1999 within case no. 21208
ORDER-DENYING-FOR-RECONSIDERATION.
SEE Appendix (A)

PETITION-FOR-WRIT-OF-CERTIORARI
JOINT APPENDIX - Volume 1

PRO, SE
Dennis Balanay
P.O. Box 357
Haleiwa, Hawaii 96712
Telephone: 637-9254
(Petitioner)

31pp

> Now hearing all of the evidence, ladies and gentlemen, the State is asking you very respectfully at this time to take the evidence, discuss the case among yourselves, apply all of your reasoning and common sense to it, and determine whether or not the defendant knew what he was doing at the time was false reporting.
>
> Thank you.

In its instructions to the jury, the court explained that in order for Dennis to be guilty of false reporting, he must have made a report to law enforcement "knowing that the information contained in the report was false." The court defined "knowingly" as follows:

> A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.
>
> A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.
>
> A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause in such a result.

The court also gave the jury instruction on the mistake of fact defense as follows:

> It is a defense to the charge of False Reporting to Law Enforcement Authorities that the defendant engaged in prohibited conduct under ignorance or mistake of fact if the ignorance or mistake of negatives the state of mind required to establish an element of the offense. In this case the defendant, Dennis Balanay, is provided a defense to charge is he was ignorant or mistaken, either reasonably or recklessly, as to the fact that negates his knowing that the information contained in this report was false.
>
> The burden is upon the prosecution to prove beyond a reasonable doubt that the defendant, Dennis Balanay, was not ignorant or mistaken as to a fact that negates his knowing that the information contained in his report was false. If the prosection fails to meet its burden, then you must find the defendant not guilty.

The court did not give a jury instruction on the mistake of law defense.

On July 24, 1997, the jury found Dennis guilty on all three counts.

II. DISCUSSION

A.

Sufficiency of Evidence

Dennis argues that the State failed to present sufficient evidence to support his conviction because it did not prove that Dennis knew the information contained in his reports to the police was false. We disagree.

1.

> On appeal, when reviewing the sufficience of evidence, evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction. . . . The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there is substantial evidence to support the conclusion of the trier of fact. . . .
>
> "Substantial evidence" . . . is credible evidence which is of sufficient quality and probative value to enable [a person] of reasonable caution to support a conclusion.

State v. Eastman, 81 Hawai`i 131, 135, 913 P.2d 57, 61 (1996) (citations omitted)

2.

Pursuant to HRS § 710-1015, a person commits the offense of false reporting if: (1) the person intentionally makes a report to law-enforcement authorities; and (2) the person knows the reported information is false. In this case, Dennis concedes that he intentionally made the alleged reports to the police. The determinative issue is whether the State presented sufficient evidence to establish that Dennis "knowingly" reported false information.

A person acts "knowingly" with respect to "attendant circumstances when he is aware that such circumstances exist."

HRS § 702-206(2)(b) (1993).[5] In establishing state of mind, "circumstantial evidence and reasonable inferences arising from circumstances surrounding the defendant's conduct is sufficient."
Eastman, 81 Hawai`i at 141, 913 P.2d at 67 (citation omitted).
"[I]t is not necessary for the prosecution to introduce direct evidence of a defendant's state of mind in order to prove that the defendant acted intentionally, knowingly, or recklessly."[6] Id. at 140-41, 913 P.2d at 66-67 (citation omitted and footnote added).

In this case, the State presented substantial evidence that Dennis knew that he did not own parcel 3. Dennis acknowledged that Robichaux paid the property taxes for parcel 3 and that the court previously dismissed the claim of adverse possession by Dennis and entered a judgement against him. Prior to the offense in question, police officers explained to Dennis that Robichaux had documents verifying his ownership and was not tresspassing on parcel 3. Also, Robichaux offered Dennis a license to use parcel 3.

Although Dennis testified that he believed he owned parcel 3 through adverse possession, "[i]n reviewing whether substantial evidence exists to support a conviction, . . . due deference must be given to the right of the [jury] to determine credibility, weigh the evidence, and draw reasonable inferences from the evidence adduced." State v. Lubong, 77 Hawai`i 429, 432, 886, P.2d 766, 769 (App. 1994) (citing State v. Naeole, 62, Haw. 563, 565, 617, P.2d 820, 823 (1980). Thus viewing the evidence in the light of the strongest for the State, we conclude there was substantial evidence to support the jury's finding that Dennis made his reports knowing they contained false information.

5/ HRS § 702-206 (1993) reads in relevant part:

Definitions of states of mind. . . .

(2) "Knowingly"

(a) A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.

(b) A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

(c) A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

6/ While instructing the jury, the court stated that

[t]he state of mind with which a person commits a[n] act, such as intentionally or knowingly, may be proved by circumstantial evidence. While witnesses may see and hear and thus be able to give direct evidence of what a persons [sic] does or fails to do, there can be no eye witness account of the state of mind with which the acts are done or omitted, but what a person does or fails to do may or may not indicate a state of mind with which one does or refrains from doing an act.

B.

Mistake of Fact Defense

Dennis argues that the State failed to disprove his mistake of fact defense beyond a reasonable doubt. Specifically, Dennis contends that the State failed to disprove his defense that he mistakenly believed he was the owner of parcel 3 through adverse possession. We disagree.

1.

The pertinent question is "whether there was substantial evidence to support the conclusion of the trier fact." Eastman, 81 Hawai`i at 135, 913 P.2d at 61 (citations omitted).

2.

HRS § 702-218 (1993) provides in relevant part as follows:

> **§ 702-218 Ignorance or mistake as a defense.** In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:
>
> (1) The ignorance or mistake of negatives the state of mind required to establish an element of the offense[.]

In this case, it was the State's burden to prove beyond a reasonable doubt that Dennis "knowingly" reported false information. If Dennis mistakenly believed[7/] he owned parcel 3, this would "[negative] the state of mind required" under HRS § 710-1015. Since Dennis raised the mistake of fact defense, the State was required to negative the defense. State v. Cavness, 80 Hawai`i 460, 464, 911 P.2d 95, 99 (App. 1996)

Dennis relies on Cavness in support of his mistake of fact defense. In Cavness, the defendant raised the mistake of fact defense in response to charges against him for criminal tresspass. The defendant alleged that he was believed he was the owner of the property. The trial court, however, did not allow him to admit evidence of this belief. Id. at 463, 911, P.2d at 98. On appeal, this court concluded that the trial court erred by excluding evidence of the defendant's mistaken belief and vacated the defendant's conviction. Id. at 466,911 P.2d at 101.

Dennis's case, however, differs from Cavness. Dennis was allowed to and did in fact testify that he believed he owned the property. "In a jury trial, [a defendant's] state of mind is a fact that must be determined by the jury." State v. Holburn, 78 Hawai`i 422, 425, 895 P2.d 173, 176 (App. 1995) (citation omitted). The state provided substantial evidence to prove the requisite state of mind of "knowingly." Therefore, it follows that there was also substantial evidence to support the jury's conclusion that the State negatived the mistake of defense asserted by Dennis.

7/ In order to negate the "knowingly" state of mind, the defendant's mistake may be reasonable, negligent, or reckless. The Commentary on HRS § 702-218 (1993) provides the following example:

> [A] person who is mistaken (either reasonably, negligently, or recklessly) as to which one of a number of similar umbrellas on a rack is the person's and who takes another's umbrella should be afforded a defense to a charge of theft predicated on either intentionally or knowingly taking the property of another.

C.

The DPA's Erroneous Argument to the Jury

Dennis argues that the court's instructions "failed to correct the incorrect impression created by the State that a reasonable person standard applied." We disagree.

The DPA argued to the jury that they should determine the mistake of fact defense by deciding whether a reasonable person in Balanay's shoes would have been so mistaken. We agree with Dennis that this argument by the State to the jury was wrong. Under HRS § 710-1015, the State was required to prove that Dennis had "know[n] that the information contained in [his] reports [was] false." Dennis's mistaken belief that he owned the parcel 3 would have negated the required state of mind whether his mistake was reasonable, negligent, or reckless. See Commentary on § 702-218 (1993).

The question is whether the DPA's erroneous argument to the jury, and the court's error in not immediately correcting the DPA's error upon defense counsel's request, was harmless beyond a reasonable doubt. Our answer is yes.

Generally, a prosecutor's improper remarks are considered cured by the court's instructions to the jury, because it is presumed "'that the jury abided by the court's admonition to disregard the statement'" State v. Kahalewai, 55 Haw. 127, 129, 516, P.2d 336, 338 (1973) (quoting State v. Cavness, 83 Hawai'i 335, 926, P.2d 1258 (1996), the Hawai'i Supreme Court stated that

The trial court is the sole source of all definitions and statements of law applicable to an issue to be resolved by the jury. . . . [F]aced with the inaccurate or incomplete instructions, the trial court has a duty to, with the aid of counsel, either correct the defective instructions or to otherwise incorporate it into its own instructions. In other words, the ultimate responsibility properly to instruct the jury lies with the circuit court and not with the trial counsel.

Id. at 358, 926 P.2d at 1281 (citation omitted).

Initially, we note that the DPA's erroneous argument to the jury contrasted with the defense counsel's correct argument to the jury. More significantly, the court subsequently instructed the jury as follows:

The court will instruct you now concerning the law which you must follow in arriving at your verdict.

You are the exclusive judges of the facts of this case. However, you must follow these instructions even though you may have opinions to the contrary. Thus, the court expressly told the jury that the court's instructions were controlling.

The court further told the jury that one of the elements required to convict Dennis of false reporting was that Dennis made a report to the police "knowing that the information contained in the report was false." The court defined "knowingly" by using the language provided in HRS § 702-206. It expressly told the jury that Dennis "is provided a defense to the charge if he was ignorant or mistaken, either reasonably or recklessly, as to the fact that negates his knowing that the information contained in this report was false." Although this latter statement should have said

"if he was ignorant or mistaken, either reasonably, negligently, or recklessly," see Commentary on § 702-218, in the context of this case, the omission of the work "negligently" was harmless because if Dennis was mistaken, his mistake was at best reckless.

Therefore, we conclude that the court sufficiently corrected any misunderstandings that may have been caused by the State's erroneous closing argument.

D.

Mistake of Law Jury Instruction

Dennis argues that the trial court committed plain error in failing to instruct the jury *sua sponte* on the defense of mistake of law. Dennis contends that such an instruction should have been given since he acted based on his reasonable reliance on the definition of adverse possession in HRS § 657-31.

1.

In reviewing jury instructions or omissions thereof in criminal cases, we must decide "whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." Cullen, 86 Hawai`i 1, 8, 946, P.2d 955, 962 (1997) (quotation mark and citations omitted).

The Hawai`i Supreme Court has held that "[d]efendants are entitled to an instruction on every defense or theory of defense having any support of evidence. . . ." State v. Robinson, 82 Hawai`i 304, 313, 922 P.2d 358, 367 (1996) (citation, emphasis, and quotation marks omitted). Such evidence, however, must "support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be." Id. at 313-14, 922 P.2d at 367-68 (citation and quotation marks omitted).

2.

To decide whether the court should have instructed the jury *sua sponte* on the defense of mistake of law, we must determine whether the evidence presented justified such an instruction.

HRS § 702-220 (1993) states that

> it shall be an affirmative defense that the defendant engaged in the conduct or caused the result alleged under the belief that the conduct or result was not legally prohibited when the defendant acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in:
>
> (1) A statute or other enactment [.]

We conclude that this defense does not apply in this case. HRS § 657-31, the "official statement of the law" that Dennis based his claim of ownership on, has not been "afterward determined to be invalid or erroneous[.]" Instead, Dennis's alleged mistaken belief resulted from his own misinterpretations of HRS § 657-31.

Originally, the Proposed Draft of the [Hawai`i Penal] Code included a mistake of law defense with the mistake of fact defense stated in HRS § 702-218. Commentary on § 702-218. However, "[t]he Legislature[,] in dealing with [HRS] § 702-218[,] deleted a defense based on mistake of law." Supplemental Commentary on § 702-218 (1993). Nevertheless,

> [a]lthough the Legislature did not provide for a defense based on mistake of law, the [Hawai`i] State Supreme Court has recognized that, in some instances, there must exist, as necessary corollary to the definition of certain offenses, a defense based on this type of mistake. [See State v. Marley, 54 Haw. 450, 476-77, 509 P.2d 1095, 1111-12 (1973).]

Supplemental Commentary on § 702-218.

> In Marley , the Hawai`i Supreme Court recognized that a reasonable mistake of law is often a complete defense . . . when the mistake of law negatives a mental state which much be shown to establish a material element of the crime. Therefore, defendants' "honest" and "reasonable" belief that they had a right or duty to be present on Honey well property, in that they had a defense assertable under American treaty law--no matter how incorrect such a belief might be--would have exonerated defendants by negativing the mental state that is an essential element of the crime.

Marley, 54 Haw. at 476-77, 509 P.2d at 1111-12. Thus, under Marley, Dennis would have had a valid mistake of law defense if his error were an "honest" and "reasonable" one. However, Dennis's erroneous belief that he owned parcel 3 despite a default judgement against him, a court order confirming the sale of parcel 3 to Robichaux, and numerous police warnings that Robichaux was not trespassing on parcel 3, was not a reasonable mistake of law.

Furthermore, even if Dennis was entitled to an instruction on the mistake of law defense, the court's failure to provide such an instruction was harmless. Dennis contends that his reliance on HRS § 657-31, and his mistaken belief that he owned parcel 3, negated the "knowingly" state of mind required for false reporting. This is the same argument he made with respect to his mistake of fact defense. The jury rejected this argument when it rejected Dennis's mistake of fact defense.

E.

De Minimis

Dennis next contends that the trial court committed plain error by not dismissing the charges against him as *de minimus*. We disagree.

We review a trial court's alleged error of failing to dismiss a charge as *de minimus* under the abuse of discretion standard. Cavness, 80 Hawai`i at 467, 911 P.2d at 102 (citing State v. Akina, 73 Haw. 75, 828 P.2d 269 (1992)). "We will reverse the trial court only if the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Ornellas, 79 Hawai`i 418, 423, 903, P.2d 723, 728 (App. 1995) (citation and internal quotation marks omitted).

2.

A dismissal of a charge as *de minimus* under HRS § 702-236 (1993)[8/] is warranted when the defendant's actions do not directly violate a statute and/or contradict the legislative intent behind the statute. Ornellas, 79 Hawai`i at 423, 903, P.2d at 728; see HRS § 702-236(1)(b). The purpose of HRS § 710-1015 is to: (1) prevent the waste of public resources; and (2) avoid the possible harm that may occur from diverting public resources from legitimate needs. Commentary on HRS § 710-1015 (1993).

We conclude that Dennis's actions did "cause or threaten the harm or evil sought to be prevented by" HRS § 710-1015. HRS § 702-236(1)(b). The record shows that Dennis called the police on thirty to forty occasions and that each meeting took between fifteen to thirty minutes. Thus, Dennis's false reports to the police resulted in the waste of public resources and may have diverted them from legitimate needs.

Dennis further contends under HRS § 702-236(1)(c) that his case "present[ed] such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense" He argues that "the legislature did not intend to punish persons who file reports with no malicious intentions of causing diversion or wastage[.]" We disagree with Dennis that this situation "cannot reasonably be regarded as envisaged by the legislature" when it enacted HRS § 710-1015. Furthermore, there is no evidence that HRS § 710-1015 was intended to punish only those who "maliciously" report false information. Therefore, we conclude that the trial court did not abuse its discretion in failing to dismiss the charges against Dennis as *de minimus*.

8/ HRS § 702-236(1) (1993) provides in pertinent part:

> **De minimis infraction.** (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or
>
> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (c) Presents such other extenuations that it cannot reasonably be be regarded as envisaged by the legislature in forbidding offense.

On this appeal, Dennis relies only on subsection (b) and (c) as grounds for a dismissal.)

IV. CONCLUSION

Accordingly, we affirm the circuit court's December 4, 1997 Judgement in Criminal No. 95-2104 and the December 4, 1997 Judgement in Criminal No. 96-2065.

DATED: Honolulu, Hawaii, April 12, 1999.

Jon N. Ikenaga, Deputy
Public Defender, City and
County of Honolulu, on the
brief for defendant-appellant.

Andrea T.Y. Low, Deputy
Prosecuting Attorney, City and
County of Honolulu, on the
brief for plaintiff-appellee.

APPEALS CLERK, FIRST CIRCUIT
##

S.C. NO. 21208

IN THE SUPREME COURT OF THE STATE OF HAWAII

TITLE OF CASE:

STATE OF HAWAI'I, Pl-Appellee,

vs

DENNIS BALANAY, Def-Appellant.

FILED
Apr 13 2 28 PM '99
K. MIYAMURA
CLERK SUPREME COURT

RECEIVED FROM CLERK OF THE SUPREME COURT, STATE OF HAWAII,

TWO (2) COPIES

MEMORANDUM OPINION, filed 4/12/99.

in the above-entitled case.

DATED: _____, HAWAII, APR 12 1999, 19____

CLERK FIRST CIRCUIT COURT
STATE OF HAWAII

RETURN TO CLERK
SUPREME COURT

BEST AVAIL

Balanay's Property Deed to TMK 6-6-01-06

RECORDATION REQUESTED BY:

Ueanne S. Hokanson

AFTER RECORDATION, RETURN TO:

Ueanne S. Hokanson
241 Clark St. Wahiawa

RETURN BY: MAIL ( ) PICKUP ( )

STATE OF HAWAII
BUREAU OF CONVEYANCES
RECEIVED AND RECORDED
Liber 4955 Page 176
'65 FEB 1 PM 1:50

UNDATED REGISTRAR

Certified to be a true and correct copy of the original presented for record
MICHIO ABAGI, Registrar

Tax Key: 6-6-01-6

WARRANTY DEED

THIS DEED, made this 30th day of January, 1965, by and between GREGORIO S. RECALDE, unmarried, and TOMAS LANGI, unmarried, both of Haleiwa, Hawaii, hereinafter collectively called "Grantor", and BONIFACIO BALANAY and SOPHIE BALANAY, husband and wife, whose residence and post office address is Emerson Road, Haleiwa, Hawaii, hereinafter collectively called "Grantee",

WITNESSETH

That Grantor, for a valuable consideration, the receipt whereof from Grantee is hereby acknowledged, does hereby grant, bargain, sell and convey unto Grantee, as Tenants by the Entirety, with full rights of survivorship, in fee simple absolute, all of that certain real property more particularly described as follows:

All of that certain parcel of land (being Apana 2 of Royal Patent No. 2642, Land Commission Award 7408 to Kawahamana), containing an area of 0.19 Acre, the location of the said premises being shown on First Taxation Division Tax Key Map 6-6-01-6, situate at Kawailoa, Wailua, City and County of Honolulu, State of Hawaii.

I hereby certify that this is a true copy from the records of the Bureau of Conveyances.

Registrar of Conveyances
Assistant Registrar, Land Court
State of Hawaii

ABLE COPY

STATE OF HAWAII)
) ss. BOOK 4955 PAGE 178
CITY AND COUNTY OF HONOLULU)

On this 30th day of January, 19 65, before me personally appeared GREGORIO S. RECALDE

SEAL

to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

Notary Public, First Judicial Circuit, State of Hawaii

My commission expires: 11-30-68

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

On this 30th day of January, 19 65, before me personally appeared TOMAS LANGI

SEAL

to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

Notary Public, First Judicial Circuit, State of Hawaii

My commission expires: 11-30-68

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) ss.
CITY AND COUNTY OF HONOLULU)

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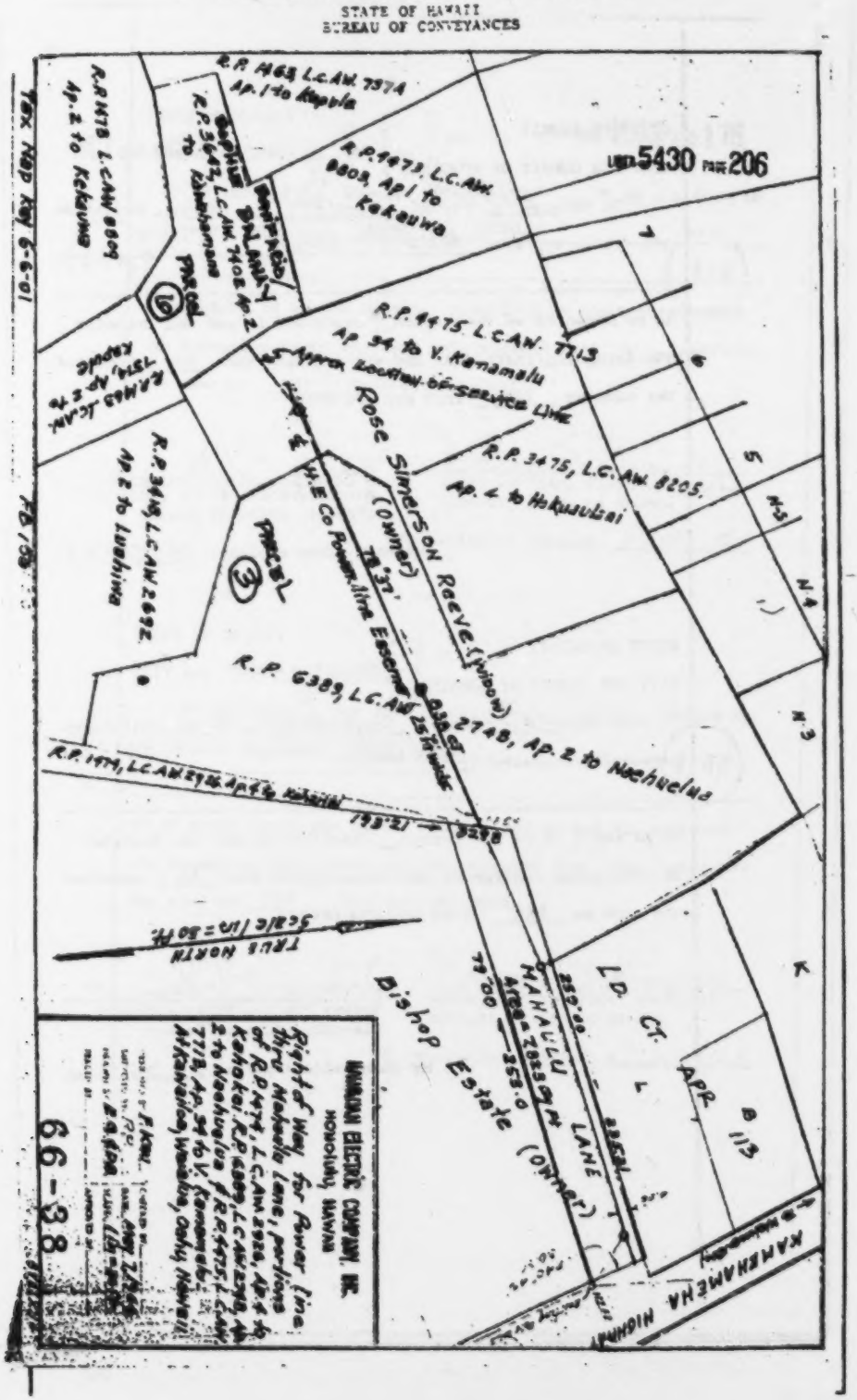
Notary Public, First Judicial Circuit, State of Hawaii

My commission expires: 11-30-68

Appendix (E) - 1966 Hawwaiian Electric Powerline to Balanay's Property TMK 6-6-001-06


STATE OF HAWAII
BUREAU OF CONVEYANCES
R.P. 4468 L.C.Aw. 7974 Ap. 1 to Kapela
R.P. 4473, L.C.Aw. 8808, Ap. 1 to Kekauwa
LIBER 5430 PAGE 206
R.P. 4475 L.C.Aw. 7713 Ap. 34 to V. Kanamalu
Approx. location of service line
Rose Simerson Reeve (Widow)
H.E. Co. Power line Easement 25 feet wide
R.P. 6389, L.C.Aw. 2748, Ap. 2 to Nachuelua
R.P. 1974, L.C.Aw. 8794, Ap. 4 to Kekauila
TRUE NORTH
Scale 1/2" = 50 Ft.
Bishop Estate
MAHALILU LANE
L.D. Ct. L
APP. B 113
KAMEHAMEHA HIGHWAY
HAWAIIAN ELECTRIC COMPANY, INC.
HONOLULU, HAWAII
66-38

E 0033

Board of Water Supply

APPLICATION FOR WATER SERVICE

66-071-D Kam Hwy.

From Mateo Cunlua

To Benifacio Balanay
P. O. Box 957
Haleiwa, HI 96712

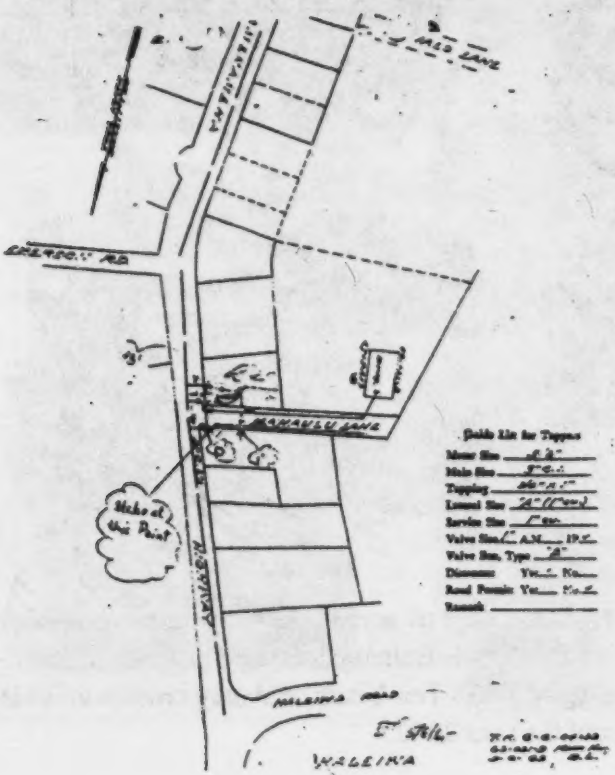
1/26/68

12/21/67

JAN 26 1968

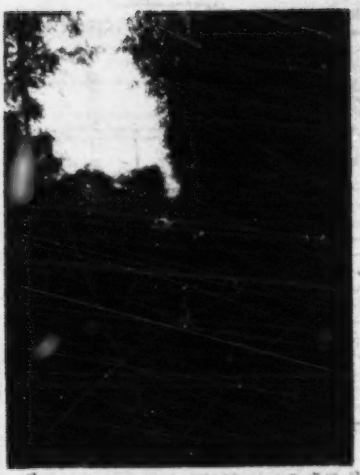
attached

0000 1943



Appendix (F)
Balanay's of TMK 1-6-6-01-6 received Honolulu Board of Water Supply service since 1968 until the year 2000. Balanay's water line crosses over TMK 1-6-6-01-03 for about 35 years.

A.



C.

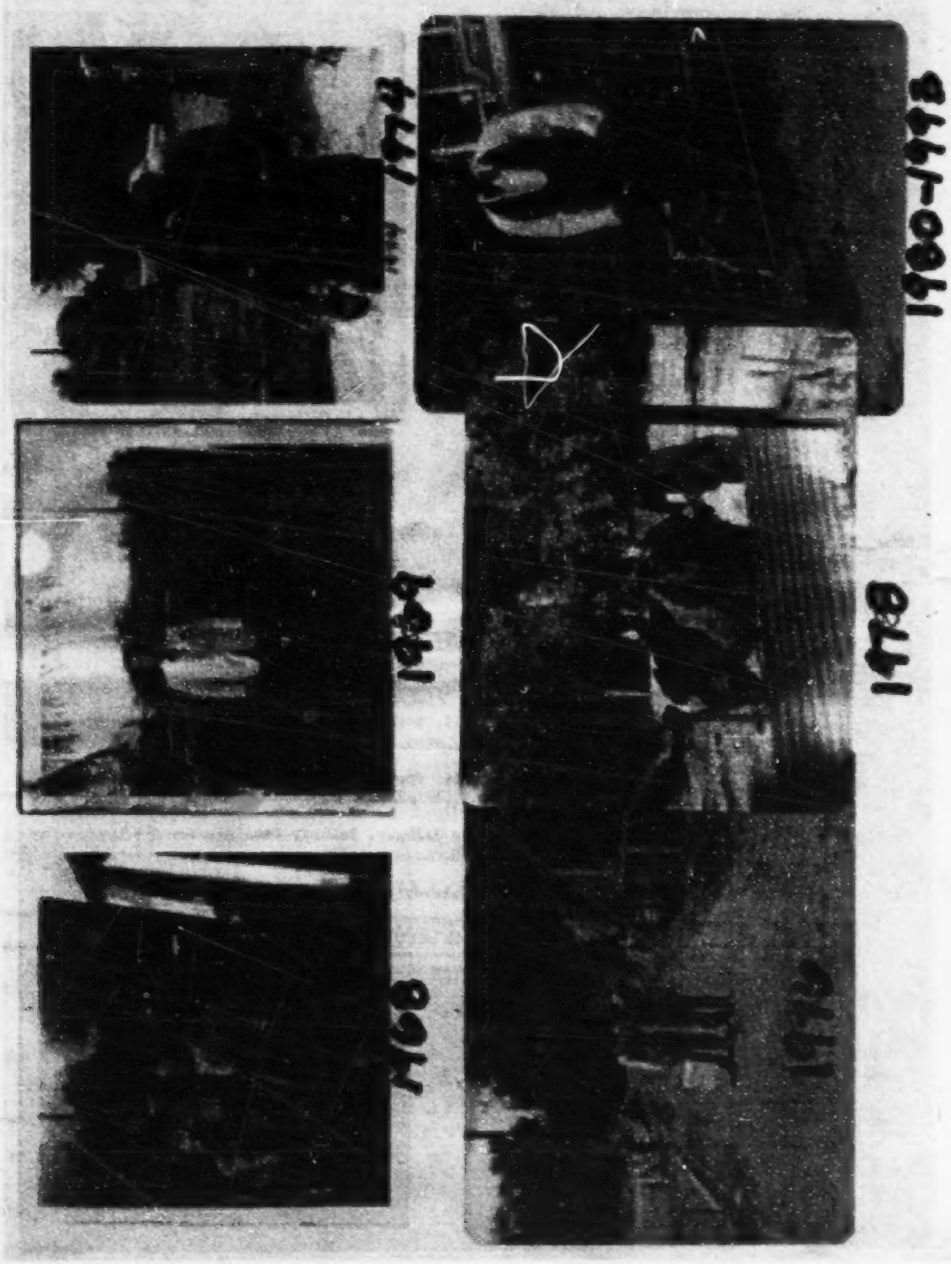
D.

B.

E.

Appendix (G) - Photos B, C & D are of actual roadway across tax map key (TMK) 1-6-6-01-03 which Dennis Balanay has legal property title under Hawaii Revised Statute 657-31 Ten Years. Balanay crossover TMK 1-6-6-01-03 since 1965 until the year 2000. -

Under Hawaii Revised Statutes 657-31 Ten Years, Balanay's have adverse possession property title to roadway across TMK 1-6-6-01-03. All photos on page 28a and 29a were Court Exhibit (G) and Court Exhibit (H) during trial hearing July 21-1997. See page 30a for exhibit list.



STATE OF HAWAII CIRCUIT COURT OF THE FIRST CIRCUIT	EXHIBIT LIST	CASE NUMBER CR. NO. 95-2104 and 96-2065

PLAINTIFF	PLAINTIFF ATTORNEY (Name, Address and Tel. No.)
State of Hawaii	Sherri-Ann Chun Deputy Prosecuting Attorney
DEFENDANT	**DEFENDANT ATTORNEY** (Name, Address and Tel. No.)
Dennis Balanay	Neil N. Murakami Deputy Public Defender

DATE OF TRIAL OR HEARING	DATE JUDGMENT FILED	PREPARING CLERK	DIVISION
July 21, 1997		N. Kikuchi	Seventeenth

EXHIBIT NO. IDENTIFY NO. CODE P PLAINTIFF D DEFENDANT	OFFERED FOR IDENTIFICATION	RECEIVED IN EVIDENCE	WITHDRAWN	DESCRIPTION OF EXHIBIT	DATE R - RETURNED D - DESTROYED OTHER COMMENTS
A (not submitted)				Certified Copy of the Complaint in Civil No. 92-1941-06	
B (not submitted)				Certified Copy of Civil No. 92-1941-06, Defendant's Sophie Balanay, Bonifacio Balanay, Jr. and Dennis Balanay's Answer to Plaintiff's Complaint(filed 6/2/92)	
C (not submitted)				Copy of Court Minutes in Civil No. 92-1941-06	
D		x		Certified Copy of Civil No. 92-1941-06, Order Granting Motion to Withdraw as Counsel for Defendant's Sophie Balanay, Bonifacio Balanay and Dennis Balanay	
E		x		Session Laws of Hawaii, Seventh State Legislature, Regular Session 1973, Acts 26 and 27	
F			x	Session Laws of Hawaii, Fourth State Legislature, Regular Session 1967, Act 258	
G		x		~~Charge~~ Photographs of Dennis Balanay, Balanay family and Property (daring 1968 through 1980)	
H		x		~~Charge~~ Photographs of the Balanay Property and roadway existing on property	

FOR OFFICE USE ONLY

LOCATION OF EXHIBITS

☐ Attached ☐ Other _____

☐ Shelf No. _____

☐ Code No. _____

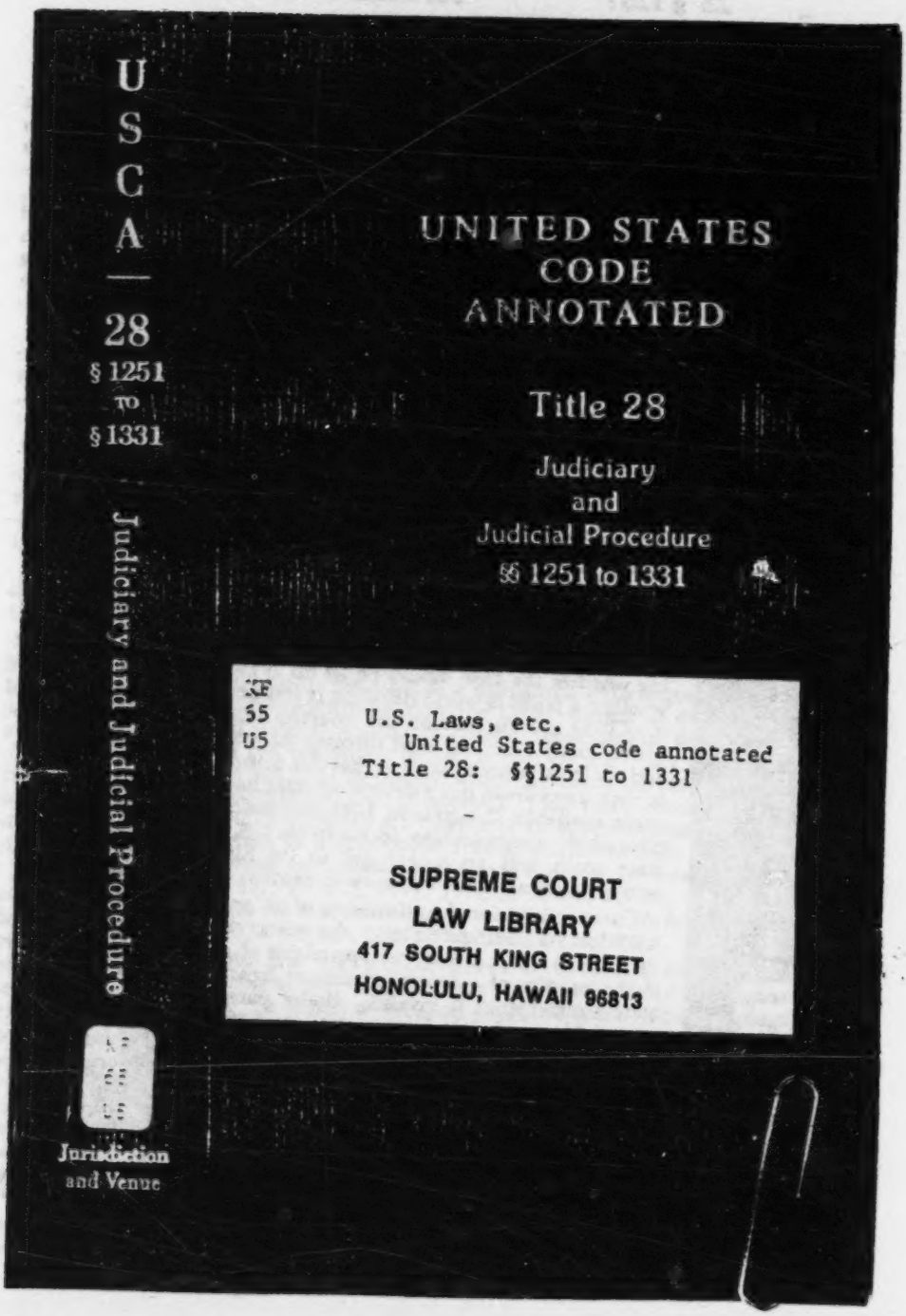
DATE	RECEIVED:	PAGE 1 OF 2 PAGES

FORM NO. 03H10 EXHIBIT LIST 1CP-023

Appendix (H)

United States Code Annotated Title 28

Section 1257



COMMENTARY ON 1988 REVISION

by David D. Siegel

U S C A | 28 § 1251 to § 1331 Judiciary and Judicial Procedure KF 65 U5 Jurisdiction and Venue

Section 1257 is another statute amended by the Supreme Court Case Selections Act (Public Law 100-352), which became law on June 27, 1988. All of the old contents were stricken out and a fresh § 1257 was enacted. The old paragraphs (1) and (2), authorizing appeal, were eliminated and only the certiorari procedure, of what was previously paragraph (3), was retained. That old paragraph (3), without change in substance, becomes subdivision (a) in the new § 1257. The last clause of the prior statute, treating the District of Columbia Court of Appeals as the equivalent of a state court for purposes of § 1257, is retained as a separate subdivision and given the letter (b).

The section governs the routing of cases from the highest state courts to the U.S. Supreme Court. Its amendment was a key part of the 1988 bill, whose main purpose was to eliminate the remaining "appeal" bases for review by the Supreme Court and require all cases to use the "certiorari" route.

The appeal route meant that Supreme Court review was mandatory: the Court would have to review the case on its merits. The certiorari route is discretionary: in effect it's a petition for permission to appeal. The Court grants the petition only if it finds that the case presents issues that warrant its attention.

The time and effort spent in determining a case on its merits—which usually involves the full briefing of the case and its oral argument—is substantially greater than that involved in determining whether the case should be let up in the first place. Deciding whether a point is worth deciding is less demanding than deciding it. Citing the burdens on the Court in having to decide on their merits many cases extruded through the mandatory "appeal" route and the great amount of time that this mandatory review necessarily took away from more deserving cases having only the certiorari route available, Congress in 1988 eliminated the mandatory route altogether. Cases seeking access to the U.S. Supreme Court from a state court will no longer get to the Supreme Court with an outright appeal; they will have to petition for certiorari.

The standard for the allowance of an appeal was also found to have lost its justification over the years. Under paragraph (1) of the prior § 1257, a case was appealable of right from a state court if the validity of a federal statute or treaty was at issue and the state court found it invalid. Under paragraph (2), a case was appealable as of right from a state court if it involved the validity of a state statute contested under some federal provision and the state court upheld the statute. (The state "statute", moreover, was construed to include local ordinances and even administrative regulations, tending to turn the appeal road into an even more crowded one.) In both cases the state court was in effect upholding the state in a contest against the federal sovereign, and the presumption underlying that doing was that the decision was suspect. Hence, appeal as of right.

With the 1988 legislation, Congress rejects that premise as unjustifiably suspicious, and, with the repeal of both paragraphs, it leaves

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the decision of whether to review to the Supreme Court. If the state court decision can be made to seem all that suspect to the Supreme Court on a certiorari petition, and the case involves an important public issue worthy of the Court's attention, the Court can be expected to grant certiorari. Congress realized that it was the Supreme Court's "finite time" that was at stake here, and that the importance of every case had to be judged not on its own intrinsic merit alone, but against all the other cases clamoring for the Court's attention. Congress's conclusion was that a judgment of each case's worth would have to be made only by one in a position to judge as well the relative worth of all the case's competitors, and only the Supreme Court occupied such a position.

Congress's reaction was the same here as it was under § 1254, governing the review of decisions of the federal courts of appeals. From that statute, too, which had both appeal and certiorari provisions, the one allowing an appeal was eliminated and the certiorari provision left to do the whole job. And a similar suspicion-based premise underlay the appeal provision in § 1254. Conversely to the appeal provision in § 1257, the one in § 1254 permitted appeal to the Supreme Court when the federal court of appeals had before it the validity of a state statute under federal law and the court found the state statute invalid. That was the federal sovereign finding against the state sovereign, and it was marked with the same suspicion that underlay § 1257 on the other side of the coin. In the circumstances of today, it appeared to Congress an unseemly comment on our federalism.

The abolition of the appeal as of right will also remove the problem of what precedential influence to give a U.S. Supreme Court decision affirming an appealed case summarily, or, indeed, dismissing it "for want of a substantial federal question", a kind of calendar-sparing weapon the Court turned to over the years to avoid the full hearing of an appealed case that did pose a federal issue but one which lacked import by the Court's standards. Unlike a denial of certiorari, which the Court has made clear is not to be taken as any kind of approval of the result reached below on the merits, a summary affirmance of an appealed case, or its dismissal for want of a substantial federal question, while not of the same influence and impact as a signed opinion, *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), was nevertheless held to be a decision approving the merits, *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

Note that the section allows certiorari to review not just a decision of the "highest court" of a state, but of the highest state court "in which a decision could be had". That language, contained in the old section and repeated in the new, takes note of the internal strictures a state may impose on appeals within its own court system, perhaps stopping a case at some lower level and barring it from review by the state's highest court, or, for that matter, from any appellate court at all. If that case nevertheless poses a federal question, review of it can be applied for to the U.S. Supreme Court—solely by the certiorari route, of course—from whatever court it has been able to reach within the state system.

Suppose, for example, that State X has set up several potential tiers of appeal for a case commenced in a court of limited jurisdic-

UNITED STATES CODE ANNOTATED

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28 § 1257

Note 13

13. —— Intermediate courts

Judgment of New York Supreme Court, Appellate Division, upholding order granting body execution as against constitutional attack was not that of the "highest court of a state" in which a decision could be had within this section giving Supreme Court jurisdiction to review such decision, where New York Court of Appeals had determined that the order appealed from was not final and was accordingly not reviewable as of right and petitioner had not sought to appeal to Court of Appeals by leave of Appellate Division as required by statute in case of nonfinal orders, and therefore certiorari to Appellate Division was improvidently granted. Gotthilf v. Sills, N.Y.1963, 84 S.Ct. 187, 375 U.S. 79, 11 L.Ed.2d 159.

Where higher state court is by Constitution or statute without power to review decision of lower court, then decision of lower court becomes the decision of the highest court within meaning of this section giving United States Supreme Court power to review final judgments by highest court of state in which a decision could be had. U.S. ex rel. Carrono v. Richmond, D.C.Conn.1959, 177 F.Supp. 504, affirmed 279 F.2d 170.

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UNITED STATES ex rel. James CARRONO
v.
Mark S. RICHMOND, Warden Connecticut State Prison.
Civ. A. No. 7885.
United States District Court
D. Connecticut.
July 31, 1959.

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Jurisdiction and Venue

merits. American Railway Express Co. v. Levee, 1923, 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140. In that case the petitioner had received an adverse decision in a civil case in a Louisiana trial court; an appeal to an intermediate appellate court, the Court of Appeal, brought an affirmance. The Supreme Court of Louisiana refused to issue a writ of certiorari to bring up the case for review "for the reason that the judgment is correct." Mr. Justice Holmes stated that the United States Supreme Court's writ of certiorari was properly addressed to the Court of Appeal rather than the Supreme Court of Louisiana. Although it was necessary for petitioner to invoke the jurisdiction of the Supreme Court of Louisiana, nevertheless, when it was declined, the Court of Appeal was shown to be "the highest court of the State in which a decision could be had." Accordingly, review of the intermediate court's judgment by the Supreme Court of the United States was permitted under the then existing statute, a predecessor of Section 1257. In Virginian Railway Co. v. Mullens, 1926, 271 U.S. 220, 46 S.Ct. 525, 70 L.Ed. 915, a civil action in tort, the judgment of a trial court was reviewed by the Supreme Court of the United States on writ of certiorari, the state's Supreme Court of Appeals having previously declined to review the judgment of the trial court. Similar treatment of an appeal rather than review on certiorari was afforded by the Court as recently as 1954. Michigan-Wisconsin Pipe Line Co. v. Calvert, 1954, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583.

APPENDIX I - SUPREME COURT OF THE UNITED STATES
Office of the Clerks Washington D.C. 20543-001
William Suter's August 4, 1999 Letter to Dennis Balanay

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

August 4, 1999

AREA CODE 202
479-3011

Dennis Balanay
P.O. Box 357
Haleiwa, HI 96712

RE: Dennis Balanay v. Hawaii

Dear Mr. Balanay:

The above-entitled petition for a writ of certiorari was postmarked July 30, 1999 and received August 2, 1999. The papers are returned for the following reason(s):

Your case must first be reviewed by a United States court of appeals or by the highest state court in which a decision could be had. 28USC 1254 and 1257.

Had the petition been properly filed it would be necessary for you to correct it. The questions presented for review must appear on the first page immediately following the cover of the petition. The petition must be followed by an appendix containing the documents required by Rule 14. The appendix must be on paper which is 5 1/8 by 9 1/4 inch paper, and must comply with the printing requirements of Rule 33. No proof of service was received. Rule 29

Also returned is money order number 83551498255, dated July 30, 1999, in the amount of $300.

Sincerely,
William K. Suter, Clerk
By: "se/_____"

Ruth Jones
(202) 47903022

Enclosures

APPENDIX J - SUPREME COURT OF THE UNITED STATES
Office of the Clerks Washington D.C. 20543-001
William Suter's October 19, 1999 Return Letter to
Petitioner Dennis Balanay

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

October 19, 1999

AREA CODE 202
479-3011

Dennis Balanay
P.O. Box 357
Haleiwa, HI 96712

RE: Dennis Balanay v. Hawaii

Dear Mr. Balanay:

Your purported petition for a writ of certiorari was received again October 6, 1999, and is returned together with your money order in the amount of $300.

You have not included in the appendix to the petition any order or opinion of the Supreme Court of Hawaii as this office requested by letter dated August 4, 1999. Until and unless you include a appendix to the petition as required by Rule 14, and present a petition that is prepared in compliance with Rule 14 it is not possible for this office to file the petition.

Enclosed is a sample petition that you may follow as to form only.

Sincerely,
William K. Suter, Clerk
By: "se/_____"

Francis J. Lorson
(202) 479-3024

Enclosures

APPENDIX K - SUPREME COURT OF THE UNITED STATES
Office of the Clerks Washington D.C. 20543-001
William Suter's November 9 , 1999 Return Letter to
Petitioner Dennis Balanay

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

November 9, 1999

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

Dennis Balanay
P.O. Box 357
Haleiwa, HI 96712

RE: Dennis Balanay v. Hawaii

Dear Mr. Balanay:

Your purported petition for a writ of certiorari was recieved again November 8, 1999 and must be returned for failure to include the orders and opinions of the Supreme Court of Hawaii as requested in prior letters from this office. Appendix A contains only the order of the Intermediate Court of Appeals of Hawaii denying a motion for reconsideration.

Your money order in the amount of $300 is returned as well.

Sincerely,
William K. Suter, Clerk
By:

Francis J. Lorson
(202) 479-3024

APPENDIX L - SUPREME COURT OF THE UNITED STATES

Office of the Clerks Washington D.C. 20543-001
William Suter's January 12, 2000 Return Letter to
Petitioner Dennis Balanay

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

January 12, 2000

WILLIAM K. SUTER
AREA CODE 202
CLERK OF THE COURT

479-3011

Dennis Balanay
P.O. Box 357
Haleiwa, HI 96712

RE: Dennis Balanay v. Hawaii

Dear Mr. Balanay:

Your purported petition for a writ of certiorari was recieved again January 11, 2000 and must be returned since you still have not included copies of the orders and opinions of the Supreme Court of Hawaii. Absent these opinions and orders, it is not possible to determine whether your petition can be filed or not.

Your attention is directed to prior letters from this office.

Your postal money order in the amount of $300 is returned.

Sincerely,
William K. Suter, Clerk
By:

Francis J. Lorson
(202) 479-3024

Enclosures
cc: Andrea-T.Y. Low

APPENDIX M - SUPREME COURT OF THE UNITED STATES
Office of the Clerks Washington D.C. 20543-001
William Suter's March 15, 2000 Return Letter to
Petitioner Dennis Balanay

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

March 15, 2000

WILLIAM K. SUTER
AREA CODE 202
CLERK OF THE COURT 479-3011

Dennis Balanay
P.O. Box 357
Haleiwa, HI 96712

RE: Dennis Balanay v. Hawaii

Dear Mr. Balanay:

Your petition and appendix in the above-entitled case were received again March 13, 2000, and must be returned since you still have not reproduced in the appendix the May 24, 1999, order of the Supreme Court of Hawaii which is required by Rule 14 of the Rules of this Court.

The type size is too small. The type must comply with Rule 33.1 in all respects. Items in the petition and in the appendix must be in the order proscribed by Rule 14. The name of the Prosecuting Attourney must be removed from the cover of the petition.

Forty corrected copies of this petition must be received in this office within 60 days of the date of this letter in order for this petition to be filed timely. See Rule 14.5 of the Rules of the Court.

Sincerely,
William K. Suter, Clerk
By:

Francis J. Lorson
(202) 479-3024

Enclosures
cc: Andrea T.Y. Low

Acknowledgment

This joint appendix for the petition for writ of certiorari will be signed by the petitioner Dennis Balanay on this date of **May, 2000**

Signed by Dennis Balanay — On this date May 12, 2000

Respectfully Submitted
PRO, SE
Dennis Balanay
P.O. Box 357
Haleiwa, Hawaii 96712
Telephone: 637-9254
(Petitioner)